Supreme Court of the United States.

October Term, 1902.
No. 634.

FREEDOM HUTCHINSON, TRUSTEE, APPELLANT,

v.

OTIS, WILCOX & CO., APPELLEES.

MOTION BY THE APPELLEES TO DISMISS OR AFFIRM.

Now come the appellees in the above-entitled cause and move this Honorable Court to dismiss the appeal herein, because this court has no jurisdiction of the same; or to affirm the decree, it being manifest that, even if this court has jurisdiction, the questions on which the jurisdiction depends are so frivolous as not to need further argument, and that the appeal was brought only for purposes of delay.

By their attorney,

ROLAND GRAY.

Supreme Court of the United States.

October Term, 1900.
No. 634.

FREEDOM HUTCHINSON, APPELLANT,

v.

OTIS, WILCOX & CO., APPELLEES.

BRIEF FOR THE APPELLEES IN SUPPORT OF THE MOTION TO DISMISS.

STATEMENT OF FACTS.

This case is an appeal from a decree of the Circuit Court of Appeals for the First Circuit affirming a decree of the District Court for the District of Massachusetts in a bankruptcy case. The facts appearing in the findings (Rec., p. 40) may be briefly stated as follows: —

Otis, Wilcox & Co., stock brokers of Chicago, were creditors of the bankrupts, E. C. Hodges & Co., stockbrokers of Boston (Frederick Swift *et al.*). Less than four months before the filing of the petition they sued the bankrupts in New York, and garnisheed Post & Flagg of that city as debtors of the bankrupts. They got judgment, took out execution, and collected from Post & Flagg the amount owed them by the bankrupts, in the belief that it had been duly recovered under a valid garnishment. The judgment was entered on the record as satisfied. Otis, Wilcox & Co. knew of the bankruptcy when they collected the amount of their judgment from the

garnishees, but it did not appear that they knew the date of the petition in bankruptcy. Post & Flagg, knowing of the bankruptcy, took a bond from Otis, Wilcox & Co. to indemnify them. E. C. Hodges had a seat in the New York Stock Exchange, which was sold after his bankruptcy. Under the rules of the Exchange, Otis, Wilcox & Co., who were also members, had a lien on the proceeds of the seat for debts due from the bankrupts to them. This claim against the bankrupt's seat Otis, Wilcox & Co. relinquished in the belief that they had already made a full settlement; and the proceeds of the sale of the seat, less some other claims of members, were paid over to the trustee in bankruptcy. The trustee subsequently sued Post & Flagg for their debt to the bankrupts. As the garnishment was void under Section 67 of the Bankrupt Act, Post & Flagg were unable to resist the suit, and called on Otis, Wilcox & Co. under the bond of indemnity. The latter agreed with the trustee to settle the suit against Post & Flagg by paying the money due by Post & Flagg to the trustee, and the trustee took such payment in full settlement of his suit. Otis, Wilcox & Co., finding that they had got nothing for the original debt owed them by the bankrupts, sought to prove their debt against the bankrupts' estate, and also petitioned the court to reinstate their lien on the proceeds of the Stock Exchange seat, which were then in the trustee's hands, and to order the trustee to pay them the amount of such proceeds ($4,091.28), which was nearly, though not quite, sufficient to pay their whole claim ($4,421.66) (Rec., p. 1). The first proof of claim being deficient in some particulars, the claimants filed an amended proof more than one year from the date of the adjudication of bankruptcy; and this amendment was allowed by the District Court (Rec., p. 5).

The District Court made a decree allowing the amended proof of claim, and also ordering the trustee to pay to Otis, Wilcox & Co. the proceeds of the Stock Exchange seat in his

hands, on account of their claim, leaving them to receive dividends on the remainder of their claim (Rec., p. 21).

The trustee appealed from this decree (Rec., p. 22), and also brought a petition for revision of the same. The appeal and petition for revision were heard and considered at the same time by the Circuit Court of Appeals, which entered decrees in both the appeal and the petition for revision, affirming the decree of the District Court (Rec., p. 32). The trustee has appealed to this court from the decree of the Circuit Court of Appeals in the appeal case.

The effect of the decree of the Circuit Court of Appeals is indicated by the findings of law made by that court for the purpose of an appeal to this court, which are as follows (Rec., p. 45):—

First. That the appellees' proof of claim should be allowed in manner and form as set forth in the decree of the District Court.

Second. That the substituted proof of claim presented by the appellees was properly allowed by the District Court.

Third. That the part of the decree of the District Court ordering that the trustee should pay to the appellees, Otis, Wilcox & Co., the sum of $4,091.28 on account of their claim, is not subject to an appeal to the Circuit Court of Appeals and is not open for revision by that court on the appeal taken by the trustee from the allowance of the claim.

The appellees contend that the Supreme Court has no jurisdiction of this appeal on any of the questions presented by these findings.

A.

First finding of law: That the appellees' proof of claim should be allowed in manner and form as set forth in the decree of the District Court.

I.

This court has jurisdiction of this appeal, if at all, only under Section 25, clause b, 1 of the Bankrupt Act of 1898: —

"From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: —

"1. Where the amount in controversy exceeds the sum of two thousand dollars, *and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State* to the Supreme Court of the United States."

Writs of error to the highest court of a State are governed by Revised Statutes, Section 709: —

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

That is to say, this appeal will lie only if some question under the Constitution or laws of the United States was raised in the court below and decided against the appellant.

It may be observed here that, in order to decide whether

such a question was raised and decided, it seems necessary in this case to examine, not only the facts and pleadings, but also the assignments of error in the decree of the District Court, and the opinion of the Circuit Court of Appeals.

II.

"It is settled law that, to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision by the State court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it." *Eustis* v. *Bolles*, 150 U. S. 361, 366.

See also *Johnson* v. *Risk*, 137 U. S. 300.
McQuade v. *Trenton*, 172 U. S. 636.

"The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the State court." *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655.

See *Sayward* v. *Denny*, 158 U. S. 180.

Even under the statute with regard to removals,—March 3, 1875, Chapter 137, Section 2,—which does not require that any right under the Constitution or laws of the United States shall be specially set up, but only that there shall be a suit "arising under the Constitution or laws of the United States," it has been held that

"It must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction

of the Constitution or some law or treaty of the United States." *Western Union Telegraph Co.* v. *Ann Arbor R.R. Co.*, 178 U. S. 239, 244.

The fact that the appeal is from a decree in a bankruptcy proceeding does not make it certain that the question involved is really a federal one. If any such conclusion followed, there would be an appeal to the Supreme Court from every decree allowing or rejecting a proof in bankruptcy.

Under the Bankrupt Act of 1867, appeals from the allowance of proofs of claim were not allowed to be carried to the Supreme Court.

Wiswall v. *Campbell*, 93 U. S. 347.
Leggett v. *Allen*, 110 U. S. 741.

The fact that a trustee in bankruptcy is a party to a suit, or that it concerns his rights as trustee to certain property, does not raise a federal question, unless the question in issue involves the construction of part of the Bankrupt Act, or some other federal statute.

Scott v. *Kelly*, 22 Wall. 57.
McKenna v. *Simpson*, 129 U. S. 506.

That one of the parties to a suit claims rights under a law of the United States, or an authority or privilege derived therefrom, does not show that the question involved is a federal one. The construction of the statute, or the validity of the authority or privilege under it, must be the point really at issue in the case, and on which a decision adverse to the appellant was rendered.

Boatmen's Savings Bank v. *State Savings Association*, 114 U. S. 265.
Blackburn v. *Portland Mining Co.*, 175 U. S. 571, 576.
DeLamar's Nevada Gold Mining Co. v. *Nesbitt*, 177 U. S. 523.
Avery v. *Popper*, 179 U. S. 305, 314.

III.

The first finding relates only to the allowance of the proof of claim, apart from the question of reinstatement of the lien on the proceeds of the Stock Exchange seat. The effect of this part of the decree of the District Court was merely to admit Otis, Wilcox & Co. to receive dividends with the other creditors, on their debt as it originally existed. There is no dispute as to the original validity of this debt. This proof was allowed by the District Court and the allowance affirmed by the Circuit Court of Appeals on appeal, as appears by the opinions of both courts, merely on general principles of law and equity, without reference to any section of the Bankrupt Act.

When Otis, Wilcox & Co. had paid the trustee the amount of his demands against Post & Flagg, both they and the trustee were left in just the same position as if Post & Flagg had not paid the money, owed by them to Hodges, to Otis, Wilcox & Co. under the garnishee process, but had paid it to the trustee in the first place. The District Court held that they should be restored to their position as creditors, on the ground that they had taken payment in the garnishment proceedings under an innocent mistake, whether of fact or of law, and had made restitution. The court said: "Equity will treat the payment to the trustee by Wilcox as a restitution made by Wilcox of money belonging to the bankrupt's estate which had come into Wilcox's hands, thus reviving Wilcox's claim" (Rec., p. 20).

The Circuit Court of Appeals found positively that there had been a mistake of fact as to the date of the bankruptcy proceedings. That court said: "The law does not look at the mere form of effecting restitution. The ultimate result was that Otis, Wilcox & Co. received nothing by their proceedings against the garnishees; and, inasmuch as they acted under a mistaken belief of fact, it follows, according to the well-settled rules of law, that all their transactions with

which the record is encumbered went for naught, and that, therefore, in the eyes of the law, everything stands precisely as if they had taken no steps whatever. The law itself restores the prior condition, without resort to any of the peculiar remedies of the chancery courts or to any other formalities whatever" (Rec., p. 29).

See *Willis* v. *Jellineck*, 27 Minn. 18.

It will be observed that in both opinions the court considered the right of Otis, Wilcox & Co. to prove as creditors so clear that the opinion is principally directed to the further question whether they had been so restored to their original position as to be entitled to a lien on the proceeds of the Stock Exchange seat.

IV.

It is anticipated that the trustee may now contend that Article IV., Section 1, of the Constitution of the United States, which provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," was drawn in question in the Circuit Court of Appeals in such a manner that an appeal lies to the Supreme Court. The ground for this contention appears to be that, when Post & Flagg paid over the money to Otis, Wilcox & Co. on the execution in the garnishee process, a formal entry of satisfaction of the judgment was made on the docket of the New York Court, which entry remains, so far as appears, still unchanged (Rec., p. 42). The trustee may contend that the mere existence of this docket entry in New York was a complete technical bar to the allowance of the claim in the bankruptcy court, and that the court was compelled by the Constitution of the United States to regard it as such, although they knew that Otis, Wilcox & Co.'s claim against the bankrupts was in fact unsatisfied.

The assignment of errors on the appeal from the District Court to the Circuit Court of Appeals (Rec., p. 22) does not mention the Constitution of the United States. It does not mention any part of the Bankrupt Act, nor any other statute of the United States, nor any New York law, nor the formal docket entry in the New York court. No part of the record shows that any right under the Constitution of the United States was specially set up in the Circuit Court of Appeals.

Neither the Constitution of the United States, nor any part of the Bankrupt Act, nor any statute of the United States, nor any New York law, nor the formal docket entry, are mentioned in the opinions of the District Court or the Circuit Court of Appeals. Those courts, presumably, took the obvious view that the trustee, after having recovered the money due to the bankrupts' estate by treating the judgment in the garnishee process as void, could not set up the record of satisfaction of that judgment as a technical bar. They treated the record of the New York court with just the same respect as they would have treated a similar record of any court anywhere, State or federal, in Massachusetts or New York. If there was any question as to a law of New York, which might have been raised, it was a question of construction, and not of validity.

See *Johnson* v. *New York Life Insurance Co.*, 187 U. S. 491.

There was also an obvious technical reply to a very technical defence. Otis, Wilcox & Co. did not offer to prove the judgment in the garnishment case, which was rendered after the adjudication of bankruptcy. They proved their debt as it existed at the time of the bankruptcy; and that debt was not, for the purpose of bankruptcy proceedings, merged in the judgment.

See *Boynton* v. *Ball*, 121 U. S. 457, 465.

B.

Second finding of law: That the substituted proof of claim presented by the appellees was properly allowed by the District Court.

I.

This is a decision, like that embodied in the first finding, allowing a claim under the Bankrupt Act. There is no appeal unless under Section 25 b, 1, of the Bankrupt Act. No appeal lies unless a right under a statute of the United States was specially set up in the Circuit Court of Appeals, and such claim of right was decided against the appellant.

No such right was specially set up. The tenth and eleventh assignments of error in the decree of the District Court, which concern this question, merely allege that the court erred in permitting the amended proof of claim to be substituted, and in allowing the same (Rec., p. 23). There is no mention of any section of the Bankrupt Act. The question of the validity of the substituted proof of claim was presented broadly to the Circuit Court of Appeals, and they decided it on the broad ground that the District Court had the right to allow the amendment in the exercise of its general equitable powers. The court says in its opinion, referring to the objection to the substituted proof: —

"This, however, is easily disposed of. Courts of bankruptcy, like courts of admiralty, permit amendments with a most liberal hand; and as there was enough in the original proof by which to amend, and as the District Court thought it equitable to allow the amendment, the appeal cannot be maintained" (Rec., p. 29).

This ground was quite sufficient for the decree of the Circuit Court of Appeals.

Re Parkes, 10 B. R. 82.
Re Baxter, 12 Fed. 72.
Re Glass, 119 Fed. 509.

The court goes on to make a suggestion as to the proper construction of Section 57 of the Bankrupt Act, but only as an additional and secondary reason why the allowance of the substituted proof was proper. The former ground, which did not involve the construction of the Act, was the principal and sufficient ground for the decision.

If the court considers that a right under Section 57 n was set up by trustee, and that a decision against that right was necessarily involved in the finding of the Circuit Court of Appeals, then it is submitted that the question as to this amended claim is a trifling one, and was so clearly disposed of properly by the Circuit Court of Appeals, for the reasons appearing in their opinion, that it is apparent that to entertain the appeal on this point would tend only to delay. The appellees, therefore, ask this court to affirm the decree of the Circuit Court of Appeals, under the provisions of Rule 6.

C.

Third finding of law: That the part of the decree of the District Court ordering that the trustee should pay to the appellees, Otis, Wilcox & Co., the sum of four thousand ninety-one dollars and twenty-eight cents ($4,091.28) on account of their claim, is not subject to an appeal to the Circuit Court of Appeals, and is not open for revision by that court on the appeal taken by the trustee from the allowance of the claim.

I.

The trustee will claim that the part of the decree of the District Court ordering the payment of the proceeds of the Stock Exchange seat to Otis, Wilcox & Co. should have been considered by the Circuit Court of Appeals on the appeal, as an incident of the allowance of the creditors' proof of their

debt, or as being itself an allowance of a claim within Section 25 a, 3, of the Bankrupt Act.

It seems that this decision of the Circuit Court of Appeals is not a decision rejecting or allowing a claim, and, therefore, does not fall within Section 25 b.

It is submitted that it is not a decision which can be appealed to this court.

II.

Decrees made by the Circuit Court of Appeals in the course of bankruptcy proceedings cannot be appealed to the Supreme Court, except in cases falling within Section 25 b of the Bankrupt Act.

If an appeal can be taken in other cases, it can only be under the Act of March 3, 1891, Section 6.

Section 24 a of the Bankrupt Act invests the Supreme Court with "appellate jurisdiction of controversies arising in bankruptcy proceedings." But Section 24 a does not enlarge the jurisdiction of the Supreme Court beyond what it would have by virtue of the Act of March 3, 1891. Its purpose, besides regulating the relations of the Supreme Court to courts of bankruptcy not within any organized circuit, and to the Supreme Court of the District of Columbia, was to guard against a construction of Section 25 which might limit the existing jurisdiction of the courts under the Act of March 3, 1891. That the jurisdiction of the Supreme Court under the Act of March 3, 1891, was not widened by Section 24 a of the Bankrupt Act of 1898 clearly appears from the opinion in *Denver First National Bank* v. *Klug*, 186 U. S. 202.

The Act of March 3, 1891, Sections 5 and 6, gives an appeal to the Supreme Court, from the Circuit Court and the Circuit Court of Appeals, only from final decrees, notwithstanding the fact that Sections 5 and 6 of that Act, which give the right of appeal, do not limit it expressly to final decrees, as did Revised Statutes, Section 691, which formerly

gave the right of appeal from the Circuit Courts to the Supreme Court.

McLish v. *Roff*, 141 U.S. 661.
Kirwan v. *Murphy*, 170 U. S. 205, 209.

But the Supreme Court has declared, in cases arising under the Bankrupt Act of 1867, that none of the orders and decrees made in the course of a bankruptcy proceeding are final decrees for the purposes of appeal, in the absence of provisions of the Bankruptcy Act expressly giving an appeal.

"The several motions made and acts done in the bankrupt court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they cannot be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by the courts below in mere bankruptcy proceedings." *Wiswall* v. *Campbell*, 93 U. S. 347, 348.

See also *Sandusky* v. *National Bank*, 23 Wall. 289.
Conro v. *Crane*, 94 U. S. 441.

As the decision embodied in the third finding in this case is a decision in the course of a bankruptcy proceeding, it is not appealable to the Supreme Court.

III.

If the court should be of opinion that an appeal does lie from the decision of the Circuit Court of Appeals embodied in the third finding of law, the appellees ask the court to affirm the decree of the Circuit Court of Appeals on this point.

The appeal to this court on this point is evidently, under the peculiar circumstances of this case, taken for delay only. The part of the decree of the District Court establishing the rights of Otis, Wilcox & Co. as lienholders on the proceeds of

the Stock Exchange seat, and ordering the payment of four thousand and ninety-one dollars and twenty-eight cents ($4,091.28) by the trustee to them as such lienholders, has been fully considered on its merits by the Circuit Court of Appeals, on the petition for revision under Section 24 b of the Bankrupt Act, which was brought by the trustee simultaneously with his appeal, the petition and the appeal being both decided at the same time and considered in the same opinion (Rec., p. 25). The Circuit Court of Appeals affirmed the decree of the District Court, (Rec., p. 32); and from this decree the trustee has not appealed, presumably because he is convinced that no appeal lies. If this court decides that the Circuit Court of Appeals should have considered on the appeal the question of the establishment of the lien, the result will be that the trustee will endeavor to bring that question also into this court by appeal under Section 25 b of the Bankrupt Act. And, for exactly the same reasons that an appeal will not lie from the decree allowing the proof of claim, no appeal will lie from the decree establishing the lien. No federal question was raised and decided in the Circuit Court of Appeals.

Under these circumstances, if the court decides that it has no jurisdiction of this appeal on the questions covered by the first two findings of the Circuit Court of Appeals, it should consider immediately the question whether the Circuit Court of Appeals erred in refusing to review in the appeal proceedings the part of the decree of the District Court which established the lien, and in reviewing that part of the decree only on the petition for revision.

IV.

The course followed by the Circuit Court of Appeals in this respect was correct.

The question was whether so much of the decree of the District Court as established the lien was before the Circuit

Court of Appeals on the appeal from the allowance of the proof of claim. That appeal was brought under Section 25 a of the Bankrupt Act, which provides: —

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals of the United States, and to the Supreme Court of the Territories, in the following cases: . . . (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

The proceeding by Otis, Wilcox & Co. to establish their lien on the proceeds of the Stock Exchange seat was a "proceeding in bankruptcy." It has always been treated as such by the parties, the referee, and the courts. It was a part of the administration of the bankrupts' estate under Section 2, clause 7, of the Bankrupt Act. Section 2 gives the scope of proceedings in bankruptcy. It "specifies in greater detail matters which are in the strictest sense proceedings in bankruptcy."

Bardes v. *Hawarden Bank*, 178 U. S. 524, 534.

By the seventh clause the court is empowered to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

See *Re Whitemer*, 105 Fed. 180.
Re McCallum, 113 Fed. 393.

V.

But the lien sought to be established by this proceeding was not a "debt or claim" within the meaning of Section 25 a, 3, above quoted. The "debt or claim" which was allowed by decree of the District Court was the debt of $4,421.66 for which proof was made. This lien is not a debt, but a privilege for a debt. In a very broad sense it

is a "claim," but not in the sense in which that term is used in the Bankrupt Act, Section 57, which treats of the "proof and allowance of claims." In that section "claim" is equivalent to "debt." By Section 1, clause 11, "debt" is defined as including "any debt, demand, or claim provable in bankruptcy." But a "debt" must always be a demand for a sum of money. There is no reason to suppose that "claim" as used in Section 25 a has any wider meaning than "debt" in this large sense, or would include an assertion of a priority, or of a lien, as against other creditors. The determination of the justice of such a demand is a part of the administration of the estate, and not the allowance or rejection of a claim against the estate.

Re Whitener, 105 Fed. 180, 186.
Re Worcester County, 102 Fed. 808, 813.
Re York, 4 B. R. 479, 483.

The question whether or not a "debt or claim" of a certain amount fixed by the proof is entitled to be paid in full, or is to be paid in full up to a certain sum, is independent of the question whether the "debt or claim" for which proof is offered is a just and valid debt. The latter question is to be appealed under Section 25 a, 3: the former cannot be appealed, but can be brought to the Circuit Court of Appeals only by a petition for revision under Section 24 b.

Re Whitener, 105 Fed. 180, 186.
Re Worcester County, 102 Fed. 808, 813.
Re Rouse, Hazard & Co., 91 Fed. 96.
Re Richards, 96 Fed. 935.
Re Hutchinson, 113 Fed. 202.

In the first case just cited the debts in question were claimed to be entitled to priority under Section 64. In the case at bar there is no question of a "priority," properly so called, as defined by Section 64. The right to payment in full

up to the amount of $4,091.28 arises from an equitable lien which does not depend upon any clause of the Bankrupt Act.

Under the Bankrupt Act of March 2, 1867, Section 8, Revised Statutes, Section 4980, an appeal was given from the District Court to the Circuit Court from the rejection of claims of creditors and the allowance of claims of creditors. This appeal did not extend to a question of the priorities of liens.

"A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt. . . . A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors." *Re York*, 4 B. R. 479, 484.

Appeals under Section 25 a and petitions for revision under Section 24 b are mutually exclusive remedies; and, when a question can be brought up to the Circuit Court of Appeals by one method, the other cannot be employed.

Re Worcester County, 102 Fed. 808, 811.
Re Eggert, 102 Fed. 735, 743.
Re Good, 99 Fed. 389.

A similar rule prevailed under the Bankrupt Act of 1867 as to appeals under Section 8 of that Act, Revised Statutes, Section 4980, and petitions for revision under Section 2 of the Act, Revised Statutes, Section 4986.

Re Alexander, 3 B. R. 29, 32 (Chase, C. J.).

There is no reason why the establishment of the lien should be treated as an incident of the allowance of the proof of claim. It was a separate question, involving different considerations.

The petition for establishment of the lien for $4,091.28 in this case is to a large extent an independent proceeding from the proof of the debt of $4,421.66. The petition refers to

the proof of claim, but it is by no means certain that, if the proof could not be allowed under Section 57 as a debt, on account of some technical objection, the lien would necessarily fall with it. A debt may be barred as such, and yet a mortgage securing the whole or a portion of it may remain good.

At any rate, the proof of claim does not depend on the petition accompanying it. It is complete in itself. The statement and assertion of the lien on the face of the proof itself was a mere precaution, perhaps unnecessary, taken in order to make sure that no portion of the creditors' security should be lost by any waiver. The question of the validity of the debt was all that was passed on by the District Court in allowing the proof of claim, and all that was before the Circuit Court of Appeals on the appeal.

ROLAND GRAY,
Of Counsel for Otis, Wilcox & Co., Appellees.

Supreme Court of the United States.

No. 634.—October Term, 1902.

Freedom Hutchinson, Trustee, Appellant, vs. Otis, Wilcox & Company. } Appeal from the United States Circuit Court of Appeals for the First Circuit.

[June 1, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court of Appeals affirming on appeal a decree of the District Court, which allowed a proof of a claim in bankruptcy by the appellee. 115 Fed. Rep. 937. The appeal to this Court was allowed by a justice of this Court under the bankruptcy act, § 25, *b*, 1, and rule 36, 2, on grounds to be explained, and now is before us on a motion to dismiss or affirm. The facts, shortly stated, are as follows: Otis, Wilcox & Co., having an admitted claim for $4,421.64, sued the bankrupts in New York and Illinois, and attached debts due to them, by trustee process. This was within four months before the filing of the petition in bankruptcy, and therefore was ineffectual as against the appellant by § 67 of the act. But Otis, Wilcox & Co., supposing that they had valid attachments, took judgments by default, and collected their debt from the parties trusteed, agreeing to save the latter harmless from liability to others. Satisfaction was entered of record in each suit. Subsequently the trustee in bankruptcy demanded payment of these debtors of the bankrupt, and as they had no defense, Otis, Wilcox & Co. paid over to the trustee the full amount of the respective debts. Otis, Wilcox & Co. filed a claim in bankruptcy, and were allowed to prove their claim.

The trustee in bankruptcy took the ground before the referee, and seems to have adhered to it, that full faith and credit to the record of satisfaction forbade the allowance of the proof. It was because of this contention that the writ of error was allowed. The jurisdiction of this Court is established and the motion to dismiss must be overruled. But so little attention was paid to the question and the contention seems to us so unmeritorious that we think that there was color for the motion, and we therefore take up the motion to affirm.

No one denies the fact or effect of the record of satisfaction. N. Y. Code of Civil Proc. § 1264; *Crotty* v. *McKenzie*, 42 N. Y. Super. Ct. Rep. 192, 201. What is said is that although it is true that on a certain day a judgment on the appellee's claim was satisfied, since that time the satisfaction

had been undone and the money restored. It is objected that Otis, Wilcox & Co. did not purport to restore to the appellant what they had received from the parties indebted to the bankrupt estate, but simply paid the debts of those parties. But names make no difference in this case. There was no identified fund. When Otis, Wilcox & Co. paid the debts out of which they had received satisfaction, they undid the satisfaction, and the trustee in bankruptcy knew it. We see no sufficient ground on which he can deny the consequence that the right to prove revived. That right cannot be made to depend on the views which the New York and Illinois courts may entertain as to the propriety of correcting the record of satisfaction to conform to present conditions, it having been right when it was made. Whether the record is corrected or not, it cannot be conclusive as to events of a later date. If it had been vacated, it would have restored the rights of the creditors by relation. *Taylor* v. *Ranney*, 4 Hill, 619, 623, 624.

The only difficulty is this: The adjudication of bankruptcy was on April 27, 1900. A petition and the original proof of claim of Otis, Wilcox & Co. were filed on March 9, 1901. At this time the trustee in bankruptcy was suing for the debts in question, but by agreement time was given to the counsel for Otis, Wilcox & Co. to look into the matter. The payment to the trustee by the last named firm, although agreed upon before, was not made until April 29, 1901, more than a year after the adjudication, so that technically the record of satisfaction really was a bar until the time for proof had gone by. Subsequently, on November 12, 1901, an amended proof was filed by consent of the trustee, and was allowed as of November 4. We are opinion that when the trustee accepted payment from Otis, Wilcox & Co. in pursuance of his previous agreement, with this proof on file, and in this way undid the satisfaction of record, he must be taken to have done so on the understanding that he accepted the consequence that the bar to the proof was removed. We follow the interpretation of the Circuit Court of Appeals, that the admitted belief of Otis, Wilcox & Co., that they had been paid, was due to a mistake of fact, and the agreement to settle seemingly having been made within the year, the delay of actual payment for a day or two beyond, for convenience of counsel, ought not to affect the result.

The appeal being here, the trustee argues two other questions. The first concerns the amended proof. The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within § 57 *n* forbidding proofs subsequent to one year after the adjudication, &c. The construction contended for is too narrow. The claim upon which the original proof was made is the

same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad. *Sanger* v. *Newton*, 134 Mass. 308. See *In re Parkes*, 10 N. B. R. 82; *In re Baxter*, 12 Fed. Rep. 72; *In re Glass*, 119 Fed. Rep. 509. The proceedings remained in the District Court, notwithstanding the appeal, and the amendment properly was allowed there. It was little more than a form, as the facts had been agreed of record, and the filing was assented to by the trustee.

A petition was filed by Otis, Wilcox & Co., asserting a lien on the proceeds of a seat in the New York Stock Exchange, which formerly belonged to the bankrupts. This lien had not been insisted on by Otis, Wilcox & Co., because of their impression that they had been paid effectually. No one having changed his position or the faith of their waiver, the District Court allowed the lien. The Circuit Court of Appeals held that this portion of the decree of the District Court was not subject to an appeal to the Circuit Court of Appeals. The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court, and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim, *Cunningham* v. *German Insurance Bank*, 101 Fed. Rep. 977; *S. C.*, 4 Am. Bank Rep. 192, and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25 regulating appeals in bankruptcy proceedings, and that the decree upon it was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," within § 25 *a*, 3, and was not an independent ground of appeal. See *In re Whitener*, 105 Fed. Rep. 180, 186; *In re Worcester County*, 102 Fed. Rep. 808, 813; *In re Rouse, Hazard & Co.*, 91 Fed. Rep. 96; *In re York*, 4 N. B. R. 479, 483. If the question should be held to come up as incident to the appeal on the proof, *Cunningham* v. *German Insurance Bank*, *supra*, we see no error in the decree of the District Court. It allowed Otis, Wilcox & Co. to correct a mistake expressly made the ground of their waiver, no new rights having intervened. We deal somewhat summarily with this point, because the merits were brought before the Circuit Court of Appeals by a petition for revision under § 24 *b*, and were disposed of very satisfactorily so far as appears on that petition. We find no error in the decree.

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.